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The Nurse and The Law

By THE HONORABLE
WILLIAM RENWICK RIDDELL,
LL.D., Etc.

Justice of the Supreme Court of Ontario

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The Nurse and The Law

By THE HONORABLE WILLIAM RENWICK RIDDELL, LL.D., Etc.

Justice of the Supreme Court of Ontario

MOST laymen and some lawyers consider law as a collection of irrational rules calculated to entrap the unwary and incidentally to make money for its professors. Some branches of the law in some countries may deserve that reproach; for example, the law of land is still, in some states, of a complicated and archaic nature, full of holes the reason for which has long disappeared—if any sound reason ever did in fact exist.

But the law as it affects the nurse in her capacity of nurse is plain and simple, and the exercise of common sense will in the main keep her safe.

What is law? If the human race lived as the Cyclopes of Homer, separate and apart, there would be no need of law, each would be a law unto himself. But once a state of society exists and man has intercourse with his fellows, there must be some rule governing that intercourse if the society is to survive. It may be that a strong man or family or class will by force impress its government upon the rest; or it may be that all are equal or as nearly equal as their varying gifts and powers permit. In any case, by far the greater part of the intercourse between individuals will be between those who are substantially equal. Customs grow up; some are found useless or even harmful and are dropped, others are found beneficial and are retained. It is these which ripen into law—that is, the principles underlying these customs become law-binding upon all individuals.

Judges in the past have taken a lead-

ing part in expressing the law, giving it a form of words, but if ever judges made law that time is past, at least in theory, and now the whole function of the judge is to find out what the law is and apply it to the case in hand.

Human nature is pretty much the same in all lands and in all ages, and it is not a matter of astonishment that the principles upon which all peoples govern their conduct toward each other are pretty much the same everywhere, allowance being made for environment and relative advance in civilization.

Nearly fourteen hundred years ago the great Roman Emperor, or rather his great lawyers, laid it down: "The precepts of the law are these—to live honorably, to harm no one, to give every one his due." But all these precepts had existed in the law for generations and had been frequently expressed, albeit in a disconnected and nonscientific form.

There are of course local regulations and rules laid down by parliament, legislature, and city councils; and these all good citizens must learn and respect. But in ninety-nine matters of daily life, the observance of Justinian's precepts will keep one in the safe path.

Indeed, for all practical purposes, the three precepts can be reduced to one, "Give every one his due."

The rights of anyone in respect to us and the correlative duties which we owe to him, that is, his due, may depend upon the moral law, whether that is an immediate gift of the Creator to man or the result of a long course of evolution. Many

of these moral duties, kindness, respect, generosity, in love preferring one another, and the like, civilized natures have agreed to leave in the realm of conscience and do not attempt to enforce. No one nowadays would regard as a good citizen one who, however venerable and venerated, would have forty-two little children torn by she-bears out of the wood, because the young toddlers had grieved him about his bald head. It is not unlikely that the children in and near Beth-el, and their parents, too, were much more civil to the prophet after the lesson, but in our state of society such a proceeding would not be tolerated.

In the early period of Anglo-Saxon, as of all other, civilization, relative duties and rights were in great measure determined by status—a slave because he was a slave, a villein because he was a villein, a baron because he was a baron, had certain fixed duties. The rule subsists in family relations; the husband and wife, the parent and child, because of being husband or wife, parent or child, have their fixed duties. A very few occupations still have their duties: no innkeeper can refuse to accept a decent guest so long as there is room for him and the guest is able and willing to pay; no ferryman, railway, or steamship line can refuse to accept a decent traveler so long as there is room; the common carrier must accept goods (such as he carries) from anyone: apart, however, from such special cases, the rights and duties of individuals toward each other are determined by contract, bargain, agreement.

It is not necessary that the contract should be express and openly stated; the affairs of life could not go on with speed and comfort if an express bargain had to be made at every turn. Accordingly the law says that bargains may be implied, that is, understood from the nature of the transaction. When you order a

beefsteak from the butcher, he does not expressly agree, in so many words, to send you a sound, wholesome steak; nevertheless the nature of the transaction is that he is considered to have agreed to do, and, if the steak is putrid or unfit for food, he has broken his bargain, you need not pay him, and if by inadvertence you eat some and have ptomaine poisoning you can sue him for damages.

So when one holds himself out as a physician or a lawyer, he impliedly agrees with anyone who employs him as such that he will apply reasonable skill and care in that employment; and, if for want of reasonable skill or care the patient or client suffers, he may sue the professional. This looks very like determining the duties by status; but in theory at least it is quite different. Where the duty is fixed by status, as it is in some countries which believe themselves to be civilized, the doctor cannot refuse to attend any patient who offers and who is able and willing to pay; with us, in our so-called Anglo-Saxon civilization, we have got beyond that stage: the doctor need not attend anyone he does not choose to attend and he may exercise that choice as arbitrarily as he sees fit; his duty arises only when he has accepted the employment, and the fact of his being a doctor in itself implies no duty to anyone.

This implied duty does not depend upon being paid or even upon the expectation of being paid—the pauper whose case is taken up by doctor or lawyer is entitled to the same care and skill as the millionaire. Lawyers have a jingle which keeps them in mind of the law that it is the employment, not payment or hope of payment, which raises the duty. More than two hundred years ago one Bernard undertook to remove from one cellar to another some casks of brandy owned by Mr. Coggs. His men let one of them fall and some of the liquor was spilled. It did

not appear that anything was to be paid for the work, but when Coggs sued, Bernard had to pay. The jingle runs:

If Bernard moveth Coggs's casks
And lets them fall and spills the brandy,
When Coggs for that lost liquor asks
Bernard must pay the damage; and he
Still must pay although he prove
He was not paid those casks to move."

The same principle applies to the nurse. The possession of a certificate or diploma as a nurse, the holding herself out as a nurse, hanging out a shingle, or advertising does not raise any duty in the nurse toward anyone. But the moment a nurse engages herself as such, a duty arises because a contract has been entered into.

The implied contract or agreement of the nurse is precisely the same as that of the doctor or lawyer, namely, an undertaking to use reasonable care and skill in the employment—reasonable skill, not necessarily the highest skill. The country doctor in general practice cannot be expected to have the skill of the specialist in a large city, but the amount of care to be taken is the same; a country practitioner can and should be as careful as the chief surgeon or chief physician of the largest hospital.

Whether the nurse is employed immediately by the patient or through the attending physician or surgeon, and whether the nurse is to be paid immediately by patient or through or by physician or hospital, and whether she is to be paid at all or is supplied gratis by the physician or hospital, her duties are exactly the same—reasonable care and skill.

It must be plain that in this as in most other instances "reason is the life of the law, nay the common law is nothing else but reason." It may be taken as certain that in all matters affecting the nurse as nurse, "nothing is law that is not reason."

"Within the brain's most secret cells
A certain Lord Chief Justice dwells
Of sovereign power, whom one and all
With common voice, we Reason call."

This very Reason, or as we call it in ordinary parlance, common sense, will determine the conduct of a nurse in all, or at least most, emergencies. As old Sam Johnson says, "We may take Fancy for a companion, but we must follow Reason as our guide."

Before ever the nurse sets up in her profession, she must fit herself for it in every way. First, physically. No one has a right to hold herself out as a nurse who is not wholly fit physically for the necessarily severe strain to which she will be subjected. Those of less physical development may of course accept only such kinds of nursing as will lay no undue burden upon them, but the cases are rare in which at some time or other this will not come, and often suddenly and unexpectedly. Health, physical health, is a necessary qualification.

Knowledge comes next. Knowledge of the right thing to do under stated circumstances under all circumstances. But do bear in mind what a most eminent doctor says, "Science is a first-rate piece of furniture for a man's upper chamber, if he has common sense on the ground floor." Oliver Wendell Holmes did not intend that apothegm to apply only to the male sex; and no one should ponder and apply it more than the nurse.

Of most women it may be said, "Say not that she did well or ill, only she did her best." The western epitaph has it, "He done his damndest, angels could do no more." That will not do for the nurse; she must live up to her advertisement and do well.

A modest dress, a clean body, a pure soul and mind, a clear conscience, all are needed for the best results. These are reasonably to be expected by every one intrusting himself to the care of a nurse.

All this in advance of employment. Then on employment, the application of that power and skill with all due care. In

this the nurse cannot delegate her duties to another or hide herself behind the orders or directions of another, doctor, patient, or friend.

In an address made to the graduating class of nurses in the Western Hospital, Toronto, in June, 1915, I told them of a graduate nurse who said she had been told to fill with boiling water a Kelly pad upon which a patient was to be placed for a severe operation. She did what she alleged she was told, with the result that the poor man's back was severely injured. The doctor said that he had told her to fill the bag with hot water. But assume the nurse's story was true. She knew perfectly well what the result would be if she followed the direction given her, she knew that there could be no possible object in using boiling water, her common sense should have told her that if the surgeon said "boiling" water there was a slip of the tongue. It was, then, not reasonable care for her to use boiling water, beyond question on her own showing she was negligent, and if the patient had sued her he would have succeeded. What she should have done was to draw the doctor's mind pointedly to the matter of the heat of the water required. Had she done this and obtained a direction from the medical man after his attention was called to the matter, the case might have a different aspect. Moreover, had she been an ignorant person, not holding herself out as skilled but picked up by the patient's friends to assist the doctor, she might well take the doctor's word as absolute and do exactly as she was told.

Take another case. A nurse is employed to look after an expectant parturient woman during and after her confinement. She is called in and finds parturition imminent, but the doctor has not arrived. What must she do? Of course all effort must be made to procure

a doctor, but when that fails, what then? She is not a midwife, she did not engage to deliver the patient, all she agreed to do was what the attending physician directed her to do or what was obviously to be done as the labor proceeded. Her duty was then precisely the same (so far as delivery was concerned) as that of any other woman. She might do nothing more than any unskilled woman would do, using such skill as she had. She would be wise to make it quite clear to patient and friends that she did not claim skill in such matters but was willing to do what she could. Unless her services were accepted on these terms, she should do nothing. If they were so accepted and she thereupon used faithfully such skill as she had, she would be doing her duty and all her duty. In case of an unfortunate result her skirts would be clear.

It depends on how and in what capacity one is engaged—what are the implied contracts. Many years ago, it is said, an Englishman went to a horse doctor to be treated. The result was not good, and he sued his medical attendant. The court said that anyone who would ask a horse doctor to treat him must be an ass and accordingly nonsuited the unfortunate plaintiff. There's a moral in that.

I have said that a nurse cannot hide herself behind the directions of another to shield herself from the results of her own negligence, and that is true. But the same act may or may not be negligence under different circumstances. A case in my own experience remains vividly impressed on my memory. When I was a medical student, my preceptor, in writing a prescription, used 3 for 5, and gave it to me to fill. I saw that the dose was many times what was usual, and dangerous if not necessarily fatal. I knew the doctor was troubled about certain matters and I determined to call his

attention to the very large dose he had prescribed; he at once corrected it. Had I filled the prescription as written without inquiry and the result been fatal, I should have been rightly adjudged guilty of manslaughter. That the doctor might have the same fate would not relieve me at all. Suppose, however, after discussion the doctor had directed the prescription to be made up as written; I would have been justified in so making it. So where a doctor gives an express direction to a nurse, which is not necessarily harmful, and there is no room to suspect that he does not know perfectly what he is doing, the nurse is justified in obeying. But notwithstanding an express direction, where what is ordered is necessarily fatal and the nurse knows it, no jury would acquit her of negligence.

The liability of medical man or hospital for the negligence or want of skill of a nurse is rather question.

Where a medical man directs a nurse to do a certain thing and she does as she is told, it does not lie in his mouth to say that she should not have done it, that she should have known better than to do it—he is liable to the patient. Had the surgeon whose nurse boiled the patient's back really given the direction she said he did, he would have had to pay heavy damages to the patient. Fortunately for him, the trial tribunal did not believe the nurse and did believe him.

It may be that the medical man has nurses of his own, supplied by him and paid by him, his "servants." In that case he will be liable for their want of skill or negligence. But the more usual case is that the doctor recommends a nurse, or

indeed may actually hire the nurse, yet the nurse is not his servant, but the doctor simply acts as the agent of the patient to hire the nurse for him. Then the medical man is not liable for the negligence or want of skill of the nurse, but only for his own negligence (if there was any) in hiring an incompetent or careless nurse. And it would not make any difference if he, for convenience, added the nurse's bill to his own and paid her himself.

Cases have occurred in England where an organization has furnished nurses in some such way and the organization has escaped liability.

In the case of a hospital, sometimes the nurses are the servants of the hospital and part of the hospital equipment, supplied to patients by the hospital. There the hospital is liable for the negligence of the nurse. I remember, when at the bar, defending a hospital for the negligence of one of its nurses who failed to watch a patient in the delirium of typhoid. The patient got up and threw himself from the window, injuring himself severely.

In London many years ago a patient who had been brought into St. George's Hospital was ordered a hot bath by the house physician. The nurses, men, gave it to him too hot and boiled him a bit. He sued the doctors, but they got off—they had not supplied the negligent nurses. Had he sued the hospital the result would have been different.

If in a hospital the patient engages the nurse, directly or indirectly, the hospital is free.

But ever and everywhere and under all circumstances the nurse is liable for her own negligence or want of skill.



